BANKRUPTING TERRORISM: THE ROLE OF US ANTI-TERRORISM LITIGATION IN THE PREVENTION OF TERRORISM AND OTHER HYBRID THREATS – A LEGAL ASSESSMENT AND OUTLOOK

SASCHA-DOMINIK BACHMANN[♣]

ABSTRACT

Global terrorist networks are dependent on receiving financial support from a variety of sources, including individuals, charities and corporations. Also known as terrorist financing, the potential of terrorism finance to resemble a global threat has been recognised and also its closeness to other international crimes such as money laundering and organized crime. As a result, possible responses have to constitute co-ordinated, multi-lateral and multi faceted actions under the umbrella of a wide range of international stakeholders such as the United Nations Security Council and the Financial Action Task Force (FATF). Combating terrorism requires a 'holistic' approach which allows for a mix of possible responses. Besides "kinetic" security operations (such as targeted killings) and the adoption of criminal prosecution measures another possible response could be the use of US styled transnational civil litigation by victims of terrorism against both, terrorist groups and their sponsors. Corporations, both profit and non profit, such as banks and other legal entities, as well as individuals, are often complicit in international terrorism in a role of aiders and abettors by providing financial assistance to the perpetrators (*cf.* UN Al-Qaida Sanctions List: *The List established and maintained by the 1267 Committee with respect to individuals, groups, undertakings and other entities associated with Al-Qaida*). Such collusion in acts of terrorism gains additional importance against the background of so called "Hybrid Threats",[1] NATO's new concept of identifying and countering new threats arising from multi-level threat scenarios. This article discusses the potential impact of US terrorism lawsuits for the global fight against terrorism.

Key words: Terrorist Finance – Aiding and Abetting Responsibility – US Alien Tort Statute – US Transnational Litigation – Hybrid Threats – Bankrupting Terrorism

[♣] Senior Lecturer in Law; Assessor Juris, LL.M, LL.D; Sascha-Dominik teaches international law at the School of Law, University of Portsmouth. The topic has been presented to audiences at the universities of Stellenbosch and Cape Town, South Africa as well as at the School of Advanced Studies, London, and the University of Surrey, UK. The author would like to thank Mrs. Sasha-Lee Afrika, LL.B, LLM, PhD - candidate Stellenbosch University for her help and assistance.

[1] NATO describes these as *Hybrid threats are those posed by adversaries, with the* ability to simultaneously employ conventional and non-conventional means adaptively in pursuit of their objectives – NATO has identified this threat and established a concept framework (MCCHT) which aims at identifying a wider comprehensive multi stakeholder response, see NATO CHT Experiment at http://www.act.nato.int/multimedia/archive/42-news-stories/618-successful-countering-hybrid-threats-experiment-in-estonia. The author took part in these experiments in May and November 2011as a NATO Rule of Law Subject Matter Expert (SME).

This article reflects on the idea of US anti terrorism litigation and how it could be used against corporate aiders and abettors of international terrorism. It further reflects on the sources, rationale, potential and shortcomings of US anti-terrorism litigation. Recommendations are made on how US styled anti-terrorism litigation could be used more effectively. The article shows how the notion of corporate human rights responsibility, which became recognised in the USA in the context of the so called "historical justice claims litigation",[2] developed and how it is applied in the context of terrorism litigation against corporate aiders and abettors of terrorism. It further explores the desirability and feasibility of subjecting these non state actors to transnational human rights litigation. It investigates, reflects and expands upon the following: the scope and nature of US Terrorism Litigation as established under the US Alien Torts Statute (ATS, also referred to as the ATCA), the Torture Victim Protection Act (TVPA), the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Anti Terrorism Act (ATA). This overview is followed by a brief reflection on the potential role of US lawsuits against aiders and abettors of terrorist activities against selected countries such as Israel and the USA. It concludes with a discussion of some notable limitations and challenges to the effective use of US civil litigation as an antiterrorism deterrent.

1. The Nature and Rationale of US Terrorism Litigation

Terrorism as a threat to our (Western) way of life and our personal security was highlighted by the '9/11' terror attacks against the USA, as well as the London '7/7' attacks. Such acts of terrorism are, however, neither new nor unique: the Northern Irish 'Troubles' from 1963 to 1985, the well publicized Palestinian terror attacks of the 1970ies (executed mostly by PLO and PLFP cadres) and Libyan sponsored terror acts in the 1980ies are just some examples. But it had to take al-Qaeda's "9/11" [3] to galvanize the world's focus and attention more.[4]

The right of a sovereign State to resort to counterterrorism measures, deemed necessary to counter terrorist threats derives directly from its duty to protect the life of its citizens and its

[2] B Stephens, *International Human Rights Litigation in U.S. Courts*, Martinus Nijhoff Publishers (2008) at 23-24

[3] The term refers to the infamous attacks on the World Trade Centre and the Pentagon on September 11, 2001, by terrorists of the Al-Qaeda network, which cost the lives of some 3000 people lost their lives. *Cf.* McGoldrick *From "9-11" to the Iraq War 2003* (2004) 9-11.

[4] See "Global Reach" for an overview of al-Qaeda attacks outside the theatres of war in Afghanistan and Iraq in *The Economist*, 7 May 2011, at 24.

sovereignty from such threats.[5] The use of kinetic/lethal[6] means (in addition to criminal justice responses) can sometimes successfully be applied for disrupting terrorist structures and capabilities (albeit often causing controversy, as the killing of Osama Bin Laden in 2011 has shown). Yet, such lethal measures are often criticised for being non – compatible with international and regional human rights law (as established under the UN Charter, its treaty-based procedures as well as regional human rights instruments).[7]

Israel, for example, has suffered under various forms of terrorist activities since its independence in 1948. Its response was the adoption of a holistic mix of "countermeasures": kinetic combat operations and lethal security operations in the form of "targeted killing operations", criminal prosecutions and the use of US civil litigation in what has become known as "Bankrupting of Terrorism"[8] litigation, which is directed against funders and abettors of terrorism. Following this Israeli experience and example, it is submitted that any future successful strategy to counter terrorism should not be based upon one single approach alone but upon a holistic, interdisciplinary approach including various responses within their respective legal frameworks and participating stakeholders is needed.

The present debate in the UK about the treatment of Abu Qatada, who despite constituting a potential security risk to the UK, cannot be deported to Jordan to stand trial for terrorism charges, highlights the dilemma when Human Rights are used to counter anti terrorism measures.[9] The European Court of Human Rights (ECtHR) stopped his extradition to Jordan on the grounds that he may face an unfair trial there with the possibility of evidence being used which had been obtained by torture. An attempt of the UK government to deport him after having secured a memorandum of understanding from the Jordanian government

[5] See Office of the United Nations High Commissioner for Human Rights, Fact sheet No 32 *Human Rights, Terrorism and Counter Terrorism* at http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf (last visited at 20-04-2012).

[6] Kinetic operations refer to combat operations with the purpose of "eliminating" terrorist cells and structures, lethal operations such as "targeted killing" falls within the wider ambit of that terminology, see Bachmann and Haeussler "Targeted Killing As A Means of Asymmetric Warfare: A Provocative View And Invitation to Debate" in 1 *Law, Crime and History* (2011) 9 – 15 on the legality of such operations and R Bergman "Killing Terror Leaders: Israel's Experience" *The Wall Street Journal* 6-8 May 2011.

[7] Bachmann and Hauessler (n 6) on the legality of kinetic targeted killing operations and Bachmann and Galvin "Pre-trial detention and control orders under British Anti-Terror Legislation post 9/11: Balancing a Need for Security with the European Convention on Human Rights – an Overview", in 28 *Windsor Yearbook of Access to Justice* (2010), 185 – 208 for a legal assessment of the present state of UK human rights.

[8] Term used by the Tel Aviv based Shurat HaDin Israel Law Center to describe terrorism litigation lawsuits, see http://www.israellawcenter.org/..

[9] *BBC News UK,* "Abu Qatada release from Long Lartin jail prompts debate", http://www.bbc.co.uk/news/world-17012448 (last visited 12-11- 2011).

blocking the use of such evidence was foiled due to an appeal to the ECtHR by the legal representatives of Qatada.[10]

Civil litigation against terrorists and their accomplices could have the potential to create additional deterrence in such instances. The correlation between terrorism and terrorist financing has been acknowledged in the United Kingdom: Part 1 of the Terrorist Asset-Freezing Act 2010 authorises the HM Treasury to freeze terrorist assets and/or restrict access to terrorist funds and assets.[11]This UK approach follows other examples, set by the UN as well as the EU, when establishing anti terrorism and terrorist financing regimes.[12] The next step would be the use of civil litigation by victims of terrorism against terrorist perpetrators here in the UK. In such cases, a lower standard of proof than in criminal matters would make the success of such a potential civil litigation case more likely: the "beyond reasonable doubt" standard of a criminal case is replaced with the "balance of probabilities" test in a civil proceeding. It is highly hypothetical at the time of writing this article whether we will see a plethora of such cases being heard here in the UK. However, there are recent judicial developments which make such a scenario not completely unlikely. In 2011, Kenyan victims of UK's counter insurgency measures during the Mau Mau emergency in Kenya during the 1950's, won the right to proceed in their quest to sue the British government.[13] While such a future case would have the government as a defendant and not a terrorist or corporate accomplice, it shows nevertheless the potential justiciability of international law violations. Time will tell whether such litigation can be extended from human rights violations to acts of terrorism and to non-state actors as defendants.

US styled transnational human rights litigation against the corporate aider and abettor of terrorist activities may possibly constitute such an additional element of a holistic anti-terrorism strategy. Such Terrorism Litigation is being used against the corporate and individual financial aider and abettor of international terrorism. So called "Bankrupting [of] Terrorism" lawsuits refer to civil litigation directed against "funding" activities such as direct payments to terrorist groups and other forms of aiding and abetting such as the provision of material support. Its rationale is based on the assumption of an alleged "indirect" or

[10] *BBC News UK*, Abu Qatada Timeline", http://www.b bc.co.uk/news/uk-17769990 (last visited 12-04-2012).
[11] *Terrorist Asset-Freezing etc Act 2010*, (c. 38), of 17.12.2010.
[12] See e.g. UN SC Res 1373 of 28.09.2001 and EU Council Regulation (EC) No 2580/2001 of 27.12.2001.
[13] See *Ndiku Mutua and others v The Foreign and Commonwealth Office* [2011] EWHC 1913 (QB); O Bowcott "Mau Mau torture claim Kenyans win right to sue British government", *The Guardian*, 21 July 2011, retrievable at http://www.guardian.co.uk/world/2011/jul/21/mau-mau-torture-kenyans-compensation.

secondary liability of the corporate actors. The focus is on the activities of corporations such as banks (see the *Arab Bank* case)[14], NGOs and religious charity organizations for example the Saudi based Islamic Relief Organization) within their respective litigation context such as the case of *Boim v Quranic Literacy*)[15].

Corporate collusion in international crimes and human rights violations warrants a dual accountability approach which can be both criminal as well as civil: it is submitted that international torts very often constitute international crimes as well. The so called 'core crimes'[16] or 'serious international crimes'[17] also constitute 'the most serious crimes of concern to the international community as a whole'.[18] This terminology follows closely the definition in human rights law of 'gross violations' and highlights the grave character of offences, which constitute in their intensity and impact a violation of the *jus cogens* principles of international law.[19] For the purpose of this article, it is important to recognize such breaches, as well as acts of international terrorism, as constituting both 'international crimes' and torts/delicts.[20]

US anti- terrorism lawsuits strike at the heart of aiding and abetting international terrorism. Such aiding complicity in acts of terrorism qualifies as indirect corporate accountability, which falls within the wider research context of corporate complicity in the commission of grave human rights abuses and the already established use of civil litigation as a possible deterrent. The article acknowledges the interdependence of the different responses to terrorism and argues for the adoption of a holistic approach to combat international terrorism. This discussion takes place before the backdrop of the present case of *Kiobel v. Royal Dutch*

[14] *Arab Bank*, 384 F.Supp. 2d 580

[15] *Boim v Quranic Literacy Inst.,* 291 F.3d 1000, 1001 -1003 (7th Cir.2002), also referred to as *Boim I* which targeted organizations for their financial support of Hamas.

[16] J.F.Murphy 'Civil liability for the commission of international crimes as an alternative to criminal prosecution' 12 *Harvard Human Rights Journal* (1999) at 6.

[17] The 'Princeton principles on universal jurisdiction' (2001) retrievable at http:// www1.umn.edu/humarts.instree/princeton.html refer to this category of crimes as 'serious crimes under international law', Principle 2(1), and add to the four above-listed crimes piracy, slavery and torture. See further Ratner & Abrams *Accountability for human rights atrocities in international law: beyond the Nuremberg legacy* (2001) 162 with additional sources.

[18] As codified in art 5(1) of the ICC Statute and arts 16-18 and 20 of the 1996 ILC's draft code. Note that the crime of aggression, as the offence most recently codified under international criminal law, still remains an undefined concept.

[19] *Cf*, 'Commentaries to the draft articles on responsibility of states for internationally wrongful acts', *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, at 285.

[20] *Ibid*. The draft articles of the ILC on responsibility of states for internationally wrongful acts do not recognise 'any distinction between State "crimes" and "delict"'.

Petroleum before the US Supreme Court which has the potential to determine the future of civil litigation in the USA in cases where the alleged violations of international law are committed outside the territory of the USA.[21] US terrorism litigation before US Federal Courts, using US federal law to establish subject matter jurisdiction can constitute an additional form of accountability for corporate (and individual) perpetrators and accomplices of human rights violations. US litigation can probably complement (but never replace) other existing forms of accountability, such as State responsibility for a breach of a human rights treaty obligation or individual criminal responsibility before an international forum of international criminal law, such as the International Criminal Court in The Hague.

2. Corporate Human Rights Responsibility as a Legal Precursor to Corporate Civil Litigation

In the context of discussing civil litigation against international terrorism it is important to expand on the evolving notion of corporate responsibility for Human Rights violations as a legal precursor to such litigation. The notion of Human Rights Responsibility reflects on the idea of corporations being active bearers of Human Rights duties and the potential they have to be Human Rights perpetrators.

The growing role of Multinational Corporations (MNCs) in the context of transnational business activities over the last 50 years[22] has also led to an increase in reports of alleged corporate collusion in gross human rights atrocities, which were either committed by state organs of a repressive state, militia or paramilitary groups.[23] Subsequently, well publicized

[21] The case of *Kiobel v. Royal Dutch Petroleum*, No. 06-4800-cv, 06-4876-cv, 2010 WL 3611392 (2d Cir. Sept. 17, 2010) has the potential to limit the scope of such litigation to individual perpetrators only and exclude lawsuits directed against corporate colluders and indirect actors. The US Supreme Court is hearing the case as of the time of writing of this article as *Kiobel v Royal Dutch Petroleum*, No. 10-1491 (argued 28 February 2012) (SCOTUS).

[22] P Blumberg, 'Asserting human rights against multinational corporations under United States law: Conceptual and procedural problems' (2002) 50 *American Journal of Comparative Law*, at 493. "In the modern global economy, the largest corporations conduct worldwide operations. They operate in the form of multinational corporate groups organized in "incredibly complex" multi-tiered corporate structures consisting of a dominant parent corporation, sub holding companies, and scores or hundreds of subservient subsidiaries scattered around the world. The 1999 World Investment Report estimated that there are almost 60,000 multinational corporate groups with more than 500,000 foreign subsidiaries and affiliates"

[23] See e.g. O. De Schutter *Transnational Corporations and Human Rights* (Hart Publishing, Oxford, Portland, OR 2006); A Ramasastry and R Thompson, 'Commerce, crime and conflict – Legal Remedies for Private Sector Liability for Grave Breaches of International Law', (Fafo Institute of Applied International Studies 2006), retrievable at http://www.fafo.no/pub/rapp/536/536.pdf (last accessed at 28-09-2011) Appendix A, 29ff (last accessed at 28-09-2011).

transnational human rights lawsuits before US federal courts took place.[24] Whilst these lawsuits were directly linked to corporate business conduct in the developing world (with a particular focus on exploitation industries) and often fall within the wider scope of the above mentioned "historical justice claims" litigation such as the two *Holocaust* lawsuits and the still ongoing *Apartheid* case, other examples of corporate collusion in present day human rights violations followed: that of corporate responsibility for acts of international terrorism, most notably since "9/11".

The United Nations recognized this potential correlation between MNCs' business operations and the potential for human rights violations. A general notion has emerged at the international level that corporate human rights violations can lead to corporate accountability with the possibility of victims' rights to redress, including a financial remedy and reparation[25] Non-binding rules on good corporate conduct[26] such as the *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*[27] of 2003 serve as an example. These rules represent a future set of non-voluntary norms for corporations. Despite being adopted by the Sub-Commission on the Promotion and Protection of Human Rights, they failed to be recognised by its main organ, the now abolished UN Human Rights Commission (as the predecessor to the Human Rights Council was known until 2006). The general response to these norms was contentious and they were even labelled as "exaggerated claims and conceptual ambiguities".[28]

Since 2006, the Special Representative of the Secretary General and Harvard professor Ruggie, has been working to transform the rather vague policy framework of "Protect, Respect and Remedy" of the UN into binding principles of "Business and Human rights". The final product, the *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* came into force in 2011. This

[24] *Cf John Doe I v. Unocal Corp.,* 403 *F.3d* 708; for an overview see B Stephens, et al. (n 2).
[25] *Ibid* and UN News "Corporate Law Firms Join UN-led Initiative on Business and Human Rights", 28 January 2009 at http://www.un.org/apps/news/story.asp?NewsID=29693&Cr=business&Cr1=Human+rights.
[26] See e.g. guidelines on good corporate practice and corporate social responsibility as listed at the University of Minnesota's Human Rights Library, retrievable at http://www1.umn.edu/humanrts/business/codes.html.
[27] U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003). See Martin-Ortega, "Business and Human Rights inConflict" in 22.3 *Ethics & International Affairs* 2008, 273-283.
[28] Ruggie in his initial 2006 *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc.E/CN.4/2006/97.

framework makes detailed recommendations to corporations for respecting human rights, pending their eventual implementation by states signatory to these principles. [29]

In conclusion, it is submitted that while there exists an evolving notion of corporate Human Rights responsibilities at the international level, there is no regime of hard law and possible enforcement mechanisms yet in place.

3. Corporate Criminal Responsibility: an insufficient deterrence to corporate aiders and abettors of terrorism

At the heart of this paper lays the recognition that an obvious lack of corporate responsibility in the context of human rights, international crimes and terrorism does exist. The successful prosecution of German Nazi industrialists before US Military Tribunals at Nuremberg for their complicity in the Holocaust (and other war crimes) during World War II[30] remains the only judicial example where the direct complicity of corporations in the commission of human rights atrocities resulted in criminal prosecution and subsequent punishment of individuals.

In essence, Nuremberg addressed the criminal responsibility of individuals in their capacity as officers of a corporation, acting on behalf of and as agents of it[31]and summarized in the *dictum* of *US v Goering*:

"When they, with knowledge of his aims, gave him [Hitler] their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent […]"[32]

Nonetheless, Nuremberg failed to indict German corporations as legal persons as such for their complicity in the *Shoa/ Holocaust* and the commission of war crimes, by failing to

[29] UN Doc A/HRC/17/31 of 21 March 2011; for the full text of the Guiding Principles, see UN Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie - Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework at http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf (last visited Jul 12, 2011).

[30] See e.g. *U.S. v. Friedrich Flick* in VI *Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No.10* (1952), 1217, 1222, *U.S. v. Alfred Krupp* in *Vol. X Law Reports of Trials of War Criminals* (1949) 130-159 as well as the so called Zyklon B case, *Bruno Tesch and others*, before the British Military Court at Hamburg I *Law Reports of Trials of War Criminals* (1947) 93 – 103

[31] Zyklon B case, *Bruno Tesch and others*, *supra* as an example for individual criminal responsibility for aiding and abetting activities as an industrialist, I *Law Reports of Trials of War Criminals* (1947) 93 – 103.

[32] *See US v Goering* in *The Nuremberg Trials,* 6 *F.R.D* (1946) 69, 112.

classify these firms as criminal organizations *per se.* Such a criminalisation would have made any individual association (such as being employed in a leadership role as director or office etc) with one of these companies a crime *in its own name*, comparable to membership in the SS as stipulated in Articles 9-11 of the Nuremberg Charter.[33] In hindsight, this omission was a missed chance to establish the principle of corporate criminal responsibility at Nuremberg and later to link it to the "Nuremberg Principles" of 1950.[34] This missed opportunity to expand the scope of criminal accountability post- 1950 was prolonged by the UN in its two *ad hoc* responses to the Yugoslav and Rwandese human rights abuses in the mid-1990ies. Neither the International Criminal Tribunal for the Former Yugoslavia (ICTY) nor the International Criminal Tribunal for Rwanda (ICTR) had the mandate to prosecute business entities as the perpetrators (or accessories) of gross human rights violations. The new International Criminal Court (ICC) in The Hague also fails to prosecute such corporate crimes under its Statute, the Rome Statute of the ICC. The only exception hereto is possible prosecution of corporate officers using the aiding and abetting responsibility test as set forth in Article 25 (3) of the ICC Statute.[35]

To date there is no recognition under international law of an independent principle of corporate criminal responsibility for the commission of gross human rights atrocities and terrorism.[36] To make matters worse, there are only few domestic provisions for the criminal prosecution of business entities.[37] This failure and perhaps even deliberate oversight in closing a 'legal black hole' of corporate criminal accountability made it necessary to expand other forms of corporate accountability, such as civil responsibility or accountability.

[33] As supplement and extension to the criminalization of certain Nazi organizations such as the Leadership of the Nazi Party and the SS under Article 9 Nuremberg Charter, see Jørgensen, *The Responsibility of States for International Crimes*, OUP (2003) at 139.

[34] The seven "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal" were published in United Nations 2 *International Law Commission Year Book 1950* (1957) 374 - 378.

[35] *There was*, however, a futile French proposal during the 1998 Rome Conference on the ICC which called for an inclusion of legal persons as well, see Art. 23(5)-(6) of the *Draft Statute for the International Criminal Court*, 1998, UN Doc A/CONF.183/2/Add.1. See Artcile 25 (3) of the ICC Statute which makes criminally responsible one who, "for the purpose of facilitating [...] aids and abets".

[36] M Kremnitzer calls for the inclusion of such responsibility in the ICC Statute "A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law" in 8 *JICJ* (2010) 918.

[37] Ramasastry and R. Thompson (n 23).

4. Corporate Civil Responsibility: US Corporate Human Rights Litigation as a possible alternative to corporate criminal accountability

US human rights litigation against the individual and corporate human rights violator, aider and abettor of such violations as well as international terrorism, has developed effectively over the last 30 years. In 1980 the 2nd Circuit District Court heard the seminal *Filartiga v Pena- Irala*[38] case, where acts of (state instigated) torture committed outside the territory of the USA and involving two non-US citizens as both victim and perpetrator, was brought as an action before US federal courts. The court established its jurisdiction in this instance based on the Alien Torts Claims Act (now being referred to as the Alien Tort Statute (ATS)), a statute from 1789 which had hardly been used for nearly 220 years.[39]

The scope of US human rights litigation is remarkably wide in the context of parties concerned. Individuals have the right to initiate legal actions against other individuals, judicial persons and in some instances, even states, as perpetrators of human rights violations. Human rights litigation under the ATS provides one of the few opportunities for natural persons as litigants to seek redress in a country other than the one where the violation has taken place. ATS adjudication[40] includes actions against individual defendants, both as state[41] and non-state[42] instigators of actionable human rights and terrorism torts[43] and an increasing number of lawsuits against MNCs[44] for their complicity in human rights atrocities committed by repressive regimes in developing countries, as well as their complicity in international terrorism.[45] The scope of this paper warrants a discussion of the general features of US styled human rights litigation with a focus on terrorism litigation as developed by US adjudication.

[38] *Filartiga v. Pena-Irala* 630 F 2d 876 (2d Cir 1980).

[39] The ATCA/ATS was only used on a few occasions prior to *Filartiga*. See *Symposium* on "Corporate liability for violations of international human rights law" in 114 *Harvard Law Review* (2001), 2033.

[40] Human rights litigation in the USA is based mainly on the ATCA/ATS as the main jurisdictional statute. Consequently, the term "ATCA/ATS" refers to any action brought before US courts under these statutes.

[41] *Filartiga v Pena-Irala* (n 38).

[42] *Kadic v Karadzic* 70 F 3d 232 (2nd Cir 1995) for an adjudication of human rights atrocities committed during the Bosnian Yugoslav War of 1991 to 1995.

[43] Such as terrorism, *cf. Smith v Socialist Peoples Libyan Arab Jamahiriya* 101 F 3d 239 (2d Cir 1996) for the terrorist Lockerbie bombing of 1988.

[44] S.-D. Bachmann "Where do we stand with human rights litigation against corporations?"2 TSAR (2007), 292-308; R Herz "The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement" in 21 *Harvard Human Rights Journal* (2008), 208–239.

[45] See H Strydom and S-D Bachmann "Civil liability of gross human rights violations" in 3 *TSAR* (2005) 448-469 454-457 for an overview and *The Independent* "Shell on trial - Oil giant in the dock over 1995 murder of activist who opposed environmental degradation of Niger Delta", retrievable at http://www.independent.co.uk/news/world/americas/shell-on-trial-1690616.html

The last decade has seen a number of cases brought against corporate aiders and abettors of human rights violations.[46] Such acts of corporate complicity included alleged collusion in a number of serious violations of international human rights law, including crimes against humanity, war crimes and torture as well as alleged violations of other human and fundamental rights as protected under various civil, political, economic, social and cultural rights treaties.[47]The case *Doe I vs. Unocal*[48] concerned allegations of corporate complicity in forced labor and torture,[49] *Wiwa v Royal Dutch Petroleum Company*[50] was based on the alleged involvement of the Royal Dutch/Shell oil group in human rights abuses in Nigeria, leading to the 1995 torture and murder of the environmental and community activist Ken Saro-Wiwa and, more recently, the allegations of corporate complicity in the commission of war crimes committed by Papua New Guinean Security Forces in *Sarei v Rio Tinto*.[51]

Three particular cases are relevant in the context of corporate human rights litigation: the two Holocaust lawsuits and the still ongoing *Apartheid* lawsuit. *In re Holocaust Victim Assets Litigation* (*Swiss Gold Bank* case)[52] nearly 900,000 victims and relatives filed a class action suit against the three largest Swiss banks in 1996, alleging that Swiss banks had breached international and national law by "knowingly retaining and concealing the assets of Holocaust victims, accepting and laundering illegally obtained Nazi loot and transacting in the profits of slave labour." The case led to a $ 1.25 billion settlement in 1998. The second Holocaust case, the *Nazi slave labour* case, [53] was a class action against DAX-listed[54] German corporations for the use of forced 'slave' labour during World War II by defendant corporations and/or their legal predecessors. This highly politicised case ended with a settlement in 1999 when the defendant corporations and the German government agreed to establish a jointly funded $5 billion foundation for compensating the surviving victims of Nazi slave labour. The Foundation 'Remembrance, Responsibility and the Future' was

[46] See Symposium (n 34) 2025- 2049; S.-D. Bachmann (n 44) 292-296.
[47] Symposium (n 39) at 2027. Herz (n 44).
[48] *John Doe I v. Unocal Corp* (n 24).
[49] The case was settled out of court in 2006, see press statement "Historic advance for universal human rights: Unocal to compensate Burmese villagers" retrievable at http://www.earthrights.org/news/press_unocal_settle.shtml
[50] *Wiwa v. Royal Dutch Petroleum Co*., 226 F.3d 88, 157 *Oil & Gas Rep*. 1, 31 *Envtl. L. Rep*. 20,166 (2d Cir 2000) (NO. 99-7223L, 99-7245XAP), the case was settled out of court in 2009 and *The Independent* "Shell on trial - Oil giant in the dock over 1995 murder of activist who opposed environmental degradation of Niger Delta", retrievable at http://www.independent.co.uk/news/world/americas/shell-on-trial-1690616.html
[51] *Sarei v. Rio Tinto*, *PLC*, 487 F.3d 1193, 1198 (9th Cir. 2007).
[52] 105 F Supp 2d 139 (EDNY 2000)
[53] *In re Nazi Era Cases Against German Defendants Litig* (2000) 198 FRD 429 (DNJ) MDL No 1337 DNJ Lead Civ No 98-4104 (WGB).
[54] DAX is the acronym for *Deutsche Aktien Index* where the major German (public) corporations are listed.

established in August 2000 by German parliamentary law[55] for the compensation of victim groups in cooperation with Jewish support groups such as the American Jewish Joint Distribution Committee (JDC). Such "historical justice claims"[56] led to further –often unsuccessful – lawsuits, most notably the unsuccessful "Brooklyn slave labour case" *In re African-American Slave Descendants Litigation*[57] and the still ongoing *Apartheid*[58] lawsuit.

In a "general" human rights torts ATS litigation against the corporate defendant, it has to be established that the alleged tort action falls under the "non-state actor" exception under the *Kadic v Karadzic*[59] rule, whereas the MNC has committed the law of nations violation directly, thus overriding the state action requirement. In the case of liability based on the MNC's complicity in acts committed by a foreign sovereign government, the plaintiff has to prove that the violation was caused by the MNC's exercise of some form of control over the acting government's officials or agents.[60] Corporate action of "aiding and abetting" of the host state's organs in the commission of the alleged human rights violations by financing and supporting such violations knowingly is sufficient for the purpose of such litigation.[61] This "control" requirement does not require the existence of actions falling under the strict "overall control"- and "effective control" test requirements under international law.[62]

The case of *Kiobel*[63] before the US Supreme Court threatens to limit severely the applicability of US judicial *fora* for acts of corporate complicity/ collusion in the commission of international crimes and human rights violations. This prospect resonates with US Chief Prosecutor's Jackson statement before the International Military Tribunal at Nuremberg, whereas "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[64] Whether this will lead to a future exclusion of such lawsuits

[55] See the German Act *Gesetz zur Errichtung einer Stiftung, Erinnerung, Verantwortung und Zukunft* of 2 August 2000 (Bundesgesetzblatt: BGBl 2000 I 1263).
[56] B. Stephens, (n 2) at 543 ff for an overview of related lawsuits within their topical context.
[57] 375 F.Supp. 2d 721 (N.D. III. 2005).
[58] See the appeal case of *In re South African Apartheid Litigation*, 02 MDL 1499 (S.D.N.Y. 2009) which continues the original unsuccessful 2004 lawsuit, *In re South African Apartheid Litigation* 346 F. Supp. 2d 538 (S.D.N.Y. 2004).
[59] (n 42).
[60] Symposium (n 39) 2039.
[61] Wiwa, (n 50).
[62] See *Prosecutor v. Dusko Tadic, Judgment Appeals Chamber* (ICTY), 38 *ILM* 1518, 1549, outlining the "overall control" test requirements for the "internationalizing" of the Bosnian conflict of 1992-1995. The ICTY decision overcame the much stricter "effective control" test of the ICJ's *Nicaragua v. USA* decision in *Military and Paramilitary Activities in and against Nicaragua, ICJ Rep* 1986, 62 *et seq.*
[63] *Kiobel v. Royal Dutch Petroleum*, (n 21).
[64] IMT, judgment of 1 October 1946 in 22 *IMT Trials* 466, reprinted in 41 *AJIL* (1947) 172-221.

against corporate aiders who does not commit the crime/ tort itself will have to been seen. It would also affect the efficiency of any future US Anti Terrorism Litigation.

5. US Anti Terrorism Litigation

5.1 Introduction and legal framework

Lawsuits against corporate and state sponsors of terrorism can be brought under the Alien Tort Statute (ATS),[65] the subsequent Torture Victim Protection Act (TVPA),[66] the Anti-Terrorism Act (ATA)[67] as amendment to the ATS, the "State Sponsors of Terrorism" exception to the Foreign Sovereign Immunities Act (FSIA Exception)[68] and finally the Racketeer Influenced and Corrupt Organizations Act (RICO).[69]

The ATS was enacted in 1789 as part of "alien law"[70] and confers subject matter jurisdiction on an US federal court when: (1) an alien plaintiff sues, (2) for tort only (3) based on an act that was committed in violation of either the law of nations[71] or a treaty of the US.[72] The law of nations is defined by customary usage and clearly articulated principles of the international community. However, not all violations of international law are actionable under the ATS: only human rights violations of a high intensity are included. Over the last 25 years, US courts developed from the *Filartiga* judgment[73] certain criteria as guidance for a possible violation of the law of nations (and as such actionable as ATS/ATCA torts). In *Forti v. Suarez-Mason*[74] the "law of nation" test[75] was developed, requiring a "universal, definable and obligatory"[76] nature of the applicable international law nominations. A violation of international human rights and international humanitarian law may qualify as such a violation

[65] 28 USC Section 1350 (also referred to as the Alien Tort Claims Act (ATCA)) reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."
[66] 28 USC Section 1350.
[67] 18 USC Sections 2331-2338
[68] 28 USC Section 1605 (a) (7) which allows lawsuit against so called state sponsors of terrorism.
[69] 18 USC Section 1961 *et sequ.*
[70] Law regulating the relations between and among non citizens towards each other.
[71] In *Kadic v. Karadzic* (n 42) 239-41, the 2nd Circuit found that certain international crimes such as genocide resembled exceptions to that rule.
[72] 28 U.S.C. § 1350 reads: "The district courts shall have original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".
[73] *Filartiga* defined torts actionable under the ATCA as "of mutual, and not merely several, concern, by means of express in international accords, that a wrong generally recognized becomes an international law violation within the meaning of the (ATCA) statute", *Filartiga v. Pena-Irala* (n 38) at 888.
[74] 672 F Supp (ND Cal 1987) 1531.
[75] Which has become recognized as the so called *Forti* test. The US Supreme Court referred to this test in its *Sosa v Alvarez-Machain* decision of 29 June 2004, 124 S Ct 2739 (2004), *Sosa* hereafter. The *Forti* test consists actually of two parts, *Forti I* and *II* with the former outlining the requirements for the *jus cogens* nature of actionable torts and the latter defining the "universality" criteria thereof, see B Stephens (n 20) at 51-52.
[76] 672 F Supp (ND Cal 1987) 1539-1540.

of the law of nations when these specific criteria are met. The 'alien' defendant has to be present or otherwise represented in the USA when the summons is served.[77] Today, the following human rights violations can be used to establish US federal jurisdiction: torture, summary execution or extrajudicial killing, genocide, war crimes and crimes against humanity, disappearances, arbitrary detention and cruel, inhuman or degrading treatment, as well as international terrorism and hostage-taking.[78] With the TVPA of 1991 the scope of human rights litigation in the USA is broadened by including acts of (state) torture and/or extra-judicial killings as actionable torts. Section 2 (a) TVPA states that "an individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture shall, in a civil action be liable for damages to that individual; or (2) subjects an individual to extra-judicial killing, shall, in a civil action, be liable for damages to the individual's legal representative, or any person who may be a claimant in an action for wrongful death". The TVPA therefore also allows lawsuits for state-sponsored human rights violations of only mid-level intensity.

In 1994 the US Congress approved the Anti-Terrorism Act (ATA)[79] of 1992 which makes provisions for civil lawsuits by US citizens for injuries and losses incurred through an act of international terrorism. The ATA defines international terrorism in its section 2331 as

"(1) the term "international terrorism" means activities that--
(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, […]
(B) appear to be intended--
(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and
(C) occur primarily outside the territorial jurisdiction of the United States, […]"

The Scope of the ATA is international in its scope, both in terms of the elements of the *actus reus* (A in conjunction with B (i-iii)) as well as the scope of territorial applicability (C). It actually provides a more refined definition of terrorism than the (non binding) definition of

[77] The so called personal service requirement of summons etc. as stipulated in Fed.R.Civ.P 4 8(e) (2).
[78] B Stephens (n 2) at 63 – 92.
[79] 18 U.S.C. Sections 2331-2339C, with the actual ATA comprising of sections 2332 to 2339C, excluding section 2332 a-h. The Act dates back to 1990, was dormant after a technical repeal in 1991 and was reenacted in 1991 as part of the Federal Courts Administration Act of 1992. See Pub. L. No. 102-572, § 1003, 106 Stat. 4506, 4521-24 (1992).

the United Nations General Assembly (GA) definition of 1994, which describes terrorist acts as:

"Criminal acts intended or calculated to provide a state or terror in the general public, a group of persons particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious, or any other nature that may be invoked to justify them".[80]

The ongoing work of the United Nations to draft a binding comprehensive Convention against terrorism,[81] has seen a recent draft provision, wherein Article 2 (a) provides: "Any person commits an offense within the meaning of the present Convention if that person [...] causes: "Death or serious bodily injury [...] or (b) serious damage to public or private property [...] or damage to property, [...] when the purpose of the conduct, by its nature and context, is to intimidate a population, or to compel a Government" to a particular action. If this Convention was to be adopted and to become part of international law, a civil action before a US Federal Court could be based on the ATS directly and not the ATS. An offence within the scope of the Convention would then constitute both, a 'law of Nations violation" as well as a "violation of a treaty the US is party to". The ATA essentially closes a judicial gap whereas acts of terrorism did not provide a cause of action under the ATS, which was highlighted in the *Tel-Oren v. Libyan Arab Republic* case of 1984.[82]

The FSIA Exception came into force in 1996 and limits the applicability of the state immunity defence in cases of state sponsored terrorism. It can be regarded as a direct judicial response to the growing threat of international terrorism directed against the USA and its citizens.[83] The FSIA Exception permits an action for damages against the state sponsor of international terrorism for personal injury or death caused by acts of torture, extra-judicial killing, aircraft sabotage, hostage-taking, or the provision of material support or resources for such an act. Such an act or the provision of support has to be by an official agent of the

[80] United Nations General Assembly Resolution 49/60 (1994) A/RES/49/60, Annex, para 3.
[81] U.N. General Assembly Draft Comprehensive Convention Against International Terrorism, Report of the Working Group, Sixth Committee, Un Doc. A/C.6/66/SR.28. The Committee plans to resume its meetings in 2013 with no meetings planned for 2012.
[82] 726 F.2d 774 (D.C. Cir. 1984), concerning the murdering and wounding of over 100 victims by the PLO.
[83] See e.g. *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 28 (D.D.C. 1999) and for a general overview *Lawsuits Against State Supporters of Terrorism: An Overview* CRS Report for Congress, retrievable at www.fas.org/sgp/crs/terror/RS22094.pdf.

foreign state who is acting within the scope of his or her duties while committing the crime.[84] The FSIA Exception effectively amended the US Foreign Sovereign Immunities Act (FSIA)[85] to permit a civil suit against state sponsors of terrorism.[86]

In 2001, the Racketeer Influenced and Corrupt Organizations (RICO) Act was amended to include actions against criminal groups that have engaged in a pattern of racketeering activity, including murder, kidnapping, arson, robbery and fraud, as well as acts of terrorism.[87] Since 2001, RICO was so far unsuccessful as legal basis against alleged 'sponsors' of international terrorism and al Qaeda.[88]

In conclusion, US Anti Terrorism Litigation, based on the above legislation, can be invoked against basically three types of possible defendants. Firstly, the state sponsor of terrorism under the FSIA, the so called FSIA state defendant.[89] Secondly, against the non FSIA state actor defendant, as an individual perpetrator or sponsor of terrorism who acts under the colour of law in terms of the *Kadic - Karadzic* rule and who does not fall under the protective scope of the FSIA.[90] Lastly, the (pure) non FSIA non state actor who does not act under the colour of law nor falls under the scope of FSIA and who basically commits or collaborates in acts of terrorism, as for example al Qaeda or Hamas**.**[91]

[84] The FSIA Exception therefore amends the Foreign States Immunity Act to permit a civil suit under the following requirements: (1) The foreign state was designated as a state sponsor of terrorism under section 6 (j) of the Export Administration Act of 1979 (50 U.S.C § 2405 (j)(1994)) or section 620 (a) of the Foreign Assistance Act of 1961 (22 U.S.C. § 2371 (1994)) at the time of the commission of the act; (2) The act was committed within the designated state and there was a reasonable opportunity for the state to arbitrate the claim; or (3) The claimant was not a US national.

[85] 28 U.S.C. §§ 1602 – 1605.

[86] Currently there are four countries designated under these authorities: Cuba, Iran, Sudan and Syria, see http://www.state.gov/j/ct/rls/crt/2010/170260.htm (last visited 27-04-2012).

[87] As amended under the 2001 PATRIOT ACT

[88] *Rux v. Republic of Sudan*, 2005 WL 2086202 (E.D.Va. 2005), for alleged material support in Al Qaeda's attack on the US warship Cole in Aden, Yemen waters in 2000, appealed

[89] *Flatow v. Islamic Republic of Iran*, (n 83) Iranian Ministry of Information and Security-defendant's daughter was killed while travelling in Israel by suicide bomber who had received support and training from agents of Iran.

[90] *Kadic v. Karadzic* (n 42) Serb leader for his role in the Bosnian ethnic cleansing as a state actor of an unrecognized government

[91] See the *Boim* litigation consisting of the cases *Boim v. Quranic Literacy Institute* (n 6) (*Boim I)*, *Boim v Holy Land Found. for Relief Dev.*, Nos.05-1815,05-1816,05-1821,05-1822 (7th Cir. 2007) (*Boim II)*and *Boim* III 549 F.3d 685, 687 97th cir.2008) - US defendant's son was killed in Israel by Hamas terrorists and the suit was directed against the alleged gunmen but also other – financial - supporters of Hamas.

5.2 The potential of US human rights litigation for combating terrorism

Human rights litigation in the US has produced some examples of a successful adjudication[92] of human rights violations and has contributed to further legal development of the idea of human rights litigation as a separate notion of civil individual accountability. Prominent examples are the above discussed Holocaust lawsuits against Swiss banks and German corporations as well as the more recent Apartheid class action. These legal mass tort actions involved multi-billion dollar claims by thousands of individual victims for the alleged corporate complicity in mass human rights violations such as forced labour, the financing and exploitation of such activities, and/or as in the Swiss case the unjust enrichment of banking institutions as a result of human rights atrocities committed within the context of the S*hoah/Holocaust*. US human rights adjudication breaks with the traditional (albeit changing) view that claims directed against state officials for violations of international humanitarian and human rights law can only be made at inter-state level[93] and that such claims cannot be made by the individual victim in his/her own name. Outside the US, the absence of a *Filartiga* styled human rights litigation is apparent and unfortunate; thus limiting the further development of a universal civil jurisdiction of domestic courts.[94] Nonetheless, civil actions in US human rights litigation have contributed to the recognition of international human rights law in other domestic court *fora*.[95] Its overall impact on the protection of human rights can be best described with a *dictum* of the above *Filartiga* case:

"[…] human rights litigation contributes to an important long-term objective: working toward a world in which those who commit gross violations of human rights are brought to justice swiftly, in whatever country they try to hide."[96]

[92] B Stephens (n 2), 239-245. The total of cases where US jurisdiction under the ATCA was granted and upheld in dozens of cases, see B Stephens, 'Judicial Deference and the Unreasonable Views of the Bush Administration', 33 *Brooklyn J. Int'l L.* 773, 813 (2008). See also Bachmann 'Terrorism Litigation As Deterrence Under International Law – From Protecting Human Rights to Countering Hybrid Threats' in 87 *Amicus Curiae* (2011) and Bachmann "Civil Liability of Corporate and Non-state Aiders and Abettors of International Terrorism as an evolving notion under International Law" *Journal of International Commercial Law and Technology* (*JICLT* 2011).

[93] BGH – III ZR 245/98 (OLG Köln) concerning claims of Greek citizens whose relatives were murdered by German security forces in 1944. The growing number of human rights cases before the European Court of Human Rights resulting in financial compensation awards for the victim plaintiff does exemplify the above mentioned change of this traditional view.

[94] *Cf* M Rau 'Domestic adjudication of international human rights abuses and the doctrine of forum non conveniens' in 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2001) 177, 194.

[95] *Ibid* and *Ronald Grant Jones v The Ministry of the Interior Al-Mamlaka Al-Arabiya as Saudiya (The Kingdom of Saudi Arabia) & Anor.* in [2004] EWCA Civil 1394 et seq paras 61-68.

[96] See the dictum *Filartiga v Pena-Irala* (n 38) at 890.

Corporate liability in anti terrorism litigation revolves around the question of corporate aiding, abetting and the overall facilitating of such terrorist activities. It always raises the question of what standard of liability should be applied. In the *Arab Bank* cases,[97] it was alleged that such corporate participation took place by the provision of material support such as financial services, providing funds or collecting funds for different terrorist organizations operating in Israel such as terrorist groups such as Hamas, the Palestinian Islamic Jihad, the Al-Aqsa Martyrs' Brigade and the Popular Front for the Liberation of Palestine.[98] In the FSIA case of *In re Terrorist Attacks on September 11, 2001*[99] the court required that the defendant had aided and abetted if he has given "substantial assistance or encouragement to the primary wrongdoer"[100]

In the context of combating international terrorism, the rationale and key features of US human rights styled litigation should be used and developed further into a possible global judicial deterrent. Corporate and individual sponsors of terrorist activities such as suicide bombings, extrajudicial killings and hostage taking are aiders and abettors of international terrorism who should be held accountable

6. Conclusion: Challenges and Outlook

The overall impact of the ruling of the court a quo[101] in the above *Kiobel v. Royal Dutch Petroleum* (currently before the US Supreme Court) for the future scope of "aiding and abetting" lawsuits for indirect corporate participation in the commission of breaches of international law will have to be seen. To what extent "donor liability" under the ATS and ATA for providing financial support to terrorist groups will become a recognized legal definition under US human rights litigation is also a question which remains open.

US human rights litigation has the potential for significant economic consequences not only for the corporate defendant in question but also for the market economies depending on the company's financial soundness: employment, tax revenues and corporate social responsibility projects are only some examples for such benefits under threat. The examples of the *Swiss*

[97] *Oran Almog, et al., v Arab Bank, PLC* (04-CV-5564(NG)(VVP), *Gila Afriat-Kurtzer, et al., v Arab Bank, PLC* (05-CV-0388(NG)(VVP) (Arab Bank hereafter) Linde v Arab Bank, PLC, 384 F Supp 2d571 (E.D.N.Y 2005) and *Almog v. Arab Bank*, PLC, 471 F. Supp. 2d 257 (E.D.N.Y 2007).
[98] *Ibid*
[99] 349 F.Supp 2d 765 (S.D.N.Y. 2005)
[100] *Ibid*, at 798.
[101] 2d Circuit, Sept 17, 2010 (n 21).

Gold Bank case the *Holocaust* lawsuits and the still ongoing *Apartheid* lawsuit demonstrate the extent and impact such mass tort litigation has the potential to affect economical and political aspects of state sovereignty.[102] Another observation relates to the impact such accountability initiatives may have in terms of 'collateral damage'. The US Material Support Act, which criminalizes every material support to terrorist organizations or individuals or entities that might be associated to terrorism, may serve as an example hereof. As a consequence of this legislation, US based humanitarian relief efforts in the East African region came to a significant standstill for fear of criminal prosecutions for aiding and abetting of terrorist groups such as *Al Shabaab*.

Another observation is linked to a possible selectiveness and bias of US ATS and ATA litigation in terms of plaintiff and defendant classes, which fail to include US and foreign parties equally. The failed attempts to adjudicate cases arising from the (alleged) illegality of Israeli settlements in the disputed areas[103] by targeting corporate colluders seem to imply such a bias. Cases against such activities, following the rationale behind corporate support for illegal activities, as substantiated in the *Apartheid* lawsuits[104] failed. One such example is the unsuccessful *Caterpillar*[105] case where corporate complicity in illegal settlement activity was regarded as collusion in breaches of international law. While the author does not regard the present situation in Israel/Palestine as comparable with South Africa's *Apartheid* pre 1994 it is left to the reader to contemplate whether such litigation could be useful in the future for any Israeli government to implement future policies of *detente* such as stopping certain

[102] The implications of the former two lawsuits were mostly political for the states in question: Switzerland and Germany faced significant negative publicity for their unwillingness to acknowledge their responsibility to acknowledge financial liability. The impact of the Apartheid lawsuit is more economical: heavy penalties will lead to a reduction of corporate wealth and consequently will have fiscal and social consequences for the market economies affected.

[103] *Occupied territories* according to UN Security Council Resolution 242 of 1967 and referring to the Gaza Strip, the Golan Heights and the West Bank. See also the Advisory opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 9 July 2004, retrievable at http://www.icj-cij.org/docket/files/131/1677.pdf.

[104] See G Harpaz "The Dispute over the Treatment of Products Exported to the European Union from the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip-The Limits of Power and the Limits of the Law" in (38/6) *Journal of World Trade* (2004) 1049-1058.

[105] In *Corrie et al v Caterpillar* CV-05192-FDB, it was alleged that Caterpillar violated international and federal US law when exporting bulldozers to the Israeli Defence Forces despite the knowledge that those were to be used for demolitions in the controlled Palestinian territories (West Bank). One of the defendants, Corrie, an US peace activist was killed while demonstrating against such demolitions. While the case was dismissed in the US it was heard as a civil case before the District Court of Haifa (April 2011). Caterpillar discontinued exports to Israel while the trial was pending.

settlement activities which would otherwise be impossible and possibly – literally – suicidal for its promoters in the often volatile climate of Israeli politics.[106]

One possible drawback of US styled transnational human rights litigation under the ATS is linked to the observation that most anti terrorism cases ended in settlement and congressional enforcement action – paired with the further complex problem of enforcing such US judgments against defendants "shielding" in non complying jurisdictions. Another observation relates to the nature of the actionable tort of international terrorism: the lack of an international binding definition of terrorism[107] reduces the scope of ATS litigation to acts of terrorism as defined under domestic US law, the ATA, and consequently prevents such litigation from developing further into an effective preventive instrument for fighting international terrorism.

In order to combat international terrorism effectively in the long term it is necessary to multiply the existing ways of anti terrorism strategies and means available and to opt for a holistic approach. One universal, multi-stakeholder and multi-modal response catalogue will have to combine elements of "hard" military security responses (including kinetic options) with the "sword approach" of international criminal prosecution and even civil anti terrorism litigation. The strong potential of an US - styled (and even based) corporate anti terrorism and human rights litigation should not be ignored – the challenge will be to maintain the momentum of such litigation, to discuss its possible value for an international concept of civil responsibility for human rights violations and related international torts and to develop it further. The drafting and introduction of a future draft convention for the adjudication of corporate complicity in international crimes such as terrorism and other hybrid threats would be beneficial[108] and close the present accountability gap, the "legal black hole" of corporate responsibility for these international crimes, delicts respectively.

[106] Yitzhak Rabin's assassination by an ultra orthodox Israeli as a consequence of his signing of the Oslo Peace Accords serves as a drastic example of such dynamics of Israeli politics.

[107] See C Powell "Defining Terrorism: Why and How in N LaViolette and C Forcese (eds) *The Human Rights of Anti-Terrorism* Irwin Law Toronto (2008), 128 -164 for a general overview of the problems defining terrorism as an international legal concept thus harmonizing a multitude of existing domestic and international anti-terrorism concepts and programmes.

[108] cf S-D Bachmann Civil Responsibility for Gross Human Rights Violations – The Need For A Global Instrument (Pretoria University Press (PULP) 2008, at 51 – 82 where the features of such a future Convention on Corporate And Individual Civil Liability for Human Rights Violations and Terrorism are discussed.